TAY LAI KIANG & ORS

v.

PUBLIC BANK BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-295 OF 1991]
6 FEBRUARY 1996

LANDLORD & TENANT: *Repairs effected by tenant - Whether repair covenant in agreement confers obligation to reinstate premises to original state*

LANDLORD & TENANT: *Repairs effected by tenant - Whether this inhibits vacant possession being granted*

LANDLORD & TENANT: *Repairs effected by tenant - Reasonable time frame- Section 47 Contracts Act 1950*

LANDLORD & TENANT: *Tenant's covenant - Parting with possession - Whether defendant was wilfully holding over premises*

EVIDENCE: *Witness - Expert witness - What constitutes an expert*

The defendant had made several alterations and/or additions to premises including the demolishing of party walls, but had given an undertaking to restore the party walls to their original state upon expiration of the lease agreement. The party walls became the substratum of the whole case for the plaintiffs.

The plaintiffs contended that the defendant failed to restore the party walls of the premises to its original state and condition. The plaintiffs further contended that there was no delivery of vacant possession after the expiry of the lease agreement and because of this the defendant had held over the premises.

The plaintiffs asserted that until the issuance of a Certificate of Fitness (CFO) for occupation by the Majlis Bandaran Johor Bahru (MBJB), the plaintiffs had every right to refuse acceptance of the keys to the premises and consequently it was impressed upon the court that the defendant did not yield up the premises by physically vacating them as the defendant had alleged.

In accordance with the relevant clause in the lease agreement, the plaintiffs sent letters to the defendant requiring the reinstatement of the property and that the reinstatement works be approved by the MBJB. The defendant retained the keys to the premises for the purpose of carrying out the works and informed the plaintiffs of this and that the keys would be returned on completion of the reinstatement works.

At the time of the completion of the works, plans were submitted to MBJB for the CFO but the MBJB only approved the plans some 2½ years later. The plaintiffs in the meantime insisted that without the CFO they would not take possession of the premises and the defendant was said to be holding over. A representative of MBJB testified that the CFO would not be issued as the reinstatement works were minor.

One of the plaintiffs, who was a developer, alleged that the rental market value for the area in question would be RM15,000 per month. The question arose as to whether he was an expert in the field.

Held:

[1] On the expiry of the lease the defendant would be under an obligation to reinstate the premises if and only if it was requested by the plaintiffs. As the repair covenant in the lease agreement revolved on the re-entry to the premises by the plaintiffs, then it had to be construed against them as landlords. Under the relevant clause of the lease agreement there was no time frame for the defendant to reinstate the premises to its original condition before the expiration of the agreement. Under s. 47 of the Contracts Act 1950, the restoration of the premises to its original state and condition would have to be made within a reasonable time and what was a reasonable time was a question of fact in each particular case.

[2] The premises could be occupied and such occupation could have been done when the defendant by letter conveyed that reinstatement works had been completed and the keys could be collected from them.

[3] When the lease agreement expired, the defendant took one month and one week to complete the reinstatement works and such a short period of time in the circumstances, should be held to be completion within a reasonable time as envisaged in s. 47 of the Contracts Act 1950.

[4] The acts of reinstatement, done at the insistence of the plaintiffs, would not in law amount to holding over of the premises.

[5] Facts by way of evidence on oath must be adduced, in determining whether a person is an expert or is not an expert. For the court to come to that finding of fact, it must be determined that the person who is to be relied upon as an expert, he must have the academic qualification, the training, the court and work experiences and particularly whether his evidence has been accepted by the courts. In the present case, the plaintiff developer was not an expert witness and his evidence in regard to the market rental of the premises had to rejected.

[Plaintiffs' claim dismissed with costs; defendant's counterclaims allowed with costs.]

Cases referred to:
Barrell v. Fordree [1932] AC 676 ***(refd)***
Crook v. Whitbread [1919] 88 LJKB 959 ***(refd)***
Doe d Abdy v. Stevens [1832] 3 B & Ad 299 ***(refd)***
Esso Standard Malaya Bhd v. Southern Cross Airways [1972] 1 MLJ 168 ***(refd)***
French & Another v. Elliott [1960] 1 WLR 40 ***(refd)***
Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9 ***(refd)***
Johnson v. Edgware Highgate & London Railway Co [1866] 35 LJ Ch 322 ***(refd)***
Kandasami v. Mohamed Mustafa [1983] 2 MLJ 85 ***(refd)***
Lee Wah Bank Ltd v. Afro-Asia Shipping Co (Pte) Ltd [1992] 2 SLR 93 ***(refd)***
Munusamy v. Public Prosecutor [1987] 1 MLJ 492 ***(refd)***
Padwick v. Scott 2 Ch D 736 ***(refd)***
Poole v. Warren [1838] 8 A & E 582 ***(refd)***
Public Prosecutor v. Muhamed bin Sulaiman [1982] 2 MLJ 320 ***(refd)***
Rosita bte Baharom v. Sabedin bin Salleh [1992] 1 CLJ 180 ***(refd)***
Soulsby v. Neving [1808] 9 East 310 ***(refd)***
Swinfen v. Bacon [1861] 6 H & N 184 ***(refd)***
Wong Chop Saow v. Public Prosecutor [1965] 1 MLJ 247 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 47
Civil Law Act 1956, s. 28(4)(a)
Dangerous Drugs Act 1952, ss. 37(da)(vi), 40(1)
Evidence Act 1950, s. 114(g)
National Land Code 1965, s. 211
Civil Law Act (Cap 43) [Sing], s. 19(4)

Other sources referred to:
Uniform Building By-Laws, 1986
Black's Law Dictionary, Henry Campbell Black; MA, 6th edn

For the plaintiffs - Johnny Chuah Chong Ying; M/s Lau Kok Guan & Partners
For the defendant - Ang Boon Heng; M/s HH Long & Co

Reported by Anitha Rajaram

JUDGMENT

Abdul Malik Ishak J:

The plaintiffs are the co-owners and registered proprietors of premises known as numbers 70 and 70A, Jalan Wong Ah Fook, 80000 Johor Bahru (hereinafter referred to as 'the premises'). By a lease agreement dated 1 January 1976, the plaintiffs leased the premises (here only number 70) to the defendant for a period of ten (10) years with an option of renewal for another five (5) years. Each month for those ten (10) years the rentals was for RM2,000. That option for renewal of the tenancy for another five (5) years was duly exercised by the defendant (see letters "D1" and "D2" of "IDP") at RM3,000 per month as 'determined and negotiated' between the parties (per cl. 4 (b) of the lease agreement). On the basis of fifteen (15) years lease, the expiry date for the lease agreement was 31 December 1990.

Under cross-examination, Tay Lai Heng (SP1 - 'Lai Heng') agreed that the defendant rented two other shophouses along Jalan Wong Ah Fook, 80000 Johor Bahru, namely, numbers 68 and 72. These two shophouses sandwiched that of number 70. Through cross-examination of Lai Heng it was established that the defendant rented these three shophouses in a row at one time and that the defendant "shifted out" from these three shophouses on 31 December 1990.

Agnes Cheok Hwee Hong (DW1 - 'Agnes') gave evidence for the defendant and she categorically stated that the defendant physically vacated the premises on 17 December 1990. Be that as it may, during the subsistence of the fifteen (15) years lease several alterations and/or additions were made to the premises. The party walls between the two adjoining shophouses numbers 68 and 72 were demolished and the defendant gave their undertaking to restore the party walls to their original state upon expiration as referred in "C2" of "IDP". Events subsequently show that these party walls became the substratum of the whole case for the plaintiffs.

The plaintiffs say that the defendant failed to restore the party walls of the premises with that of shophouses numbers 68 and 72 to its original state and condition. This meant that there was no delivery of vacant possession of the premises after the expiry of the lease agreement on 31 December 1990 and, because of this, it was said that the premises was held over by the defendant commencing from 1 January 1991.

The defendant, on the other hand, held the opposite views and urged this court to dismiss the plaintiffs' claim with costs. The defendant also urged this court to allow their counterclaims with costs.

The whole trial hinges on the interpretation to be attached to cl. 2 (i) of the lease agreement and for convenience it is reproduced hereinunder:

> Not to make or permit to be made any alterations in or additions to the demised premises or the lessors' fittings therein without having first obtained the written licence and consent of the lessors (referring to the plaintiffs) thereof and in the event of such licence and consent being given to carry out at the lessee's own expense such alterations or additions with such materials and in such manner and at such times as shall be designated by the lessors and **upon the determination of the term hereby created if requested by the lessors, to restore the demised premises to its original state and condition at the expense of the lessee (referring to the defendant)**.

It is the plaintiffs' case that the above quoted clause particularly the underlined portions imposes an obligation on the defendant to reinstate the premises to its original state and condition before the expiry of the lease agreement. Both Lai Heng and Tay Lai Hee (PW2 - 'Lai Hee') testified that the premises would be reinstated to its original state and condition upon the issuance of the Certificate of Fitness for occupation ('CFO') by the Majlis Bandaran Johor Bahru ('MBJB'). It was said that until that contingency happens (ie, the issuance of the CFO by MBJB), the plaintiffs had every right to refuse acceptance of the keys to the premises and, consequently, it was impressed upon me that the defendant did not yield up the premises by physically vacating them on 17 December 1990 as adverted to by Agnes.

Now, what does the phrase "upon the determination of the term hereby created if requested by the lessors" appearing in cl. 2 (i) of the lease agreement mean? The Oxford Dictionary, volume X1 defines the word "upon" as (1) "denoting the day of an occurrence, regarded as a unit of time" and (2) "on the occasion of". When viewed in this perspective, the phrase must necessarily mean "on expiry of the lease if requested by the lessors" and that being the case the defendant is obliged to restore the premises to its original state and condition at its own expense upon the plaintiffs' request. Put differently, on the expiry of the lease the defendant would be under an obligation to reinstate the premises, if and only if, it is requested by the plaintiffs. It is now trite that where the language employed is plain and admits of but one meaning, the task of interpretation can hardly be said to arise.

As Lord Warrington of Clyffe said in the case of *Barrell v. Fordree* [1932] AC 676:

> The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.

It is germane to mention here that Lord Tenterden CJ in *Doe d. Abdy v. Stevens* [1832] 3 B. & Ad. 299; and Romilly M.R. in *Johnson v. Edgware, Highgate And London Railway Company* [1866] 35 LJ Ch 322 share the same view to the effect that in cases of doubt contracts of tenancy are to be construed against the landlords, especially as to stipulations for re-entry. My attention was drawn to a letter dated 20 November 1985 exhibited as "D2" at "IDP" and in that letter the defendant expressed their willingness to exercise the option of renewing the lease agreement for another five (5) years and said that they would prepare the "tenancy agreement" for the plaintiffs' execution. But the controversial cl. 2 (i) of the lease agreement as found in the annexure in "IDP" was agreed upon by the parties on 1 January 1976 and registered under s. 211 of the National Land Code, 1965 ('NLC') on 7 January 1976 in compliance with Form 15A of the NLC. There was no evidence who prepared the lease agreement dated 1 January 1976 – whether it was the plaintiffs or the defendant. If the defendant prepared the lease agreement dated 1 January 1976 the maxim verba chartarum fortius accipiuntur contra proferentem would be brought to bear against the defendant. As Lord Brightman remarked in *Kandasami v. Mohamed Mustafa* [1983] 2 MLJ 85 especially at p. 88:

> Furthermore, there is a principle of construction that if a document interpartes contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

In my judgment, as cl. 2 (i) of the lease agreement revolves on the re-entry to the premises by the plaintiffs, then it must be construed against them as landlords. This brings me to the next obvious question and it is this: When was the defendant required to complete the reinstatement works? Agnes testified that under cl. 2 (i) of the lease agreement there was no time frame for the defendant to reinstate the premises to its original condition before the expiration of the lease agreement. I wholeheartedly agree with her and I may add that under s. 47 of the Contracts Act 1950 the restoration of the premises to its original state and condition must be made within a reasonable time and what is a reasonable time is a question of fact in each particular case.

By letter dated 21 November 1990 (pp. 3 and 5 of "IDD"), Agnes conveyed the mesage to the sixth plaintiff that they would not be renewing the lease when it expires on 31 December 1990 and enquired whether the sixth plaintiff requires the defendant to reinstate the premises. In the same letter Agnes too reminded the sixth plaintiff to return the rental deposit, upon the expiry of the lease, to the defendant. In her testimony Agnes adverted to the absence of any stipulation in the lease agreement that requires the defendant to obtain permission from MBJB for reinstatement works on the premises after the termination of the lease agreement. By letters dated 1 December 1990,

4 December 1990 and 5 December 1990, the plaintiffs acting individually or through their solicitors (pp. 8 to 12 of "IDD") replied to the defendant's letter dated 21 November 1990 and, briefly, they all required the defendant to reinstate the premises to its original condition. In response, Agnes replied vide letter dated 20 December 1990 (pp. 13 to 22A of "IDD") to all the plaintiffs and requested them to confirm the reinstatement works to be carried out. The plaintiffs replied individually or through their solicitors by letters dated 24 December 1990, 26 December 1990 and 30 December 1990 (pp. 21B, 22B and 23 of "IDD") where, firstly, they required the defendant to reinstate the premises to its original condition and, secondly, that the reinstatement works have to be approved by MBJB. Agnes testified that in order to expedite the reinstatement, an Architect was engaged and this must be for the purpose of submitting plans to MBJB. At the same time Agnes emphasised that reinstatement works at the site were carried out in view of the urgency of the matter. Agnes even wrote letters dated 15 January 1991 (pp. 24 to 28 of "IDD") to all the plaintiffs informing them that the defendant would retain the keys to the premises for purposes of carrying out reinstatement works and that those keys would be returned after completion of the reinstatement works. By letter dated 8 February 1991 (p. 33 of "IDD"), Agnes informed all the plaintiffs that the reinstatement works had been completed and requested them to collect the keys at the defendant's office located at Orchid Plaza. The defendant's Architect submitted the relevant plans to MBJB on 13 March 1991. The MBJB acknowledged receipt of those plans on 14 March 1991 (p. 58 of 'IDTD'). It was only on 30 December 1993 that those plans were approved (p. 60 of "IDTD") by MBJB and according to Mahathir bin Mohamed (DW2 - 'Mahathir'), the Pembantu Teknik Kanan of MBJB, a fee of RM460 was imposed. That fee was paid.

It is clear that reinstatement works were carried out on the premises and, in due course, completed even before the relevant plans were approved. This state of affairs irked the plaintiffs and made them insist that without the CFO they would not take possession of the premises and in that situation the defendant was said to be holding over.

When will CFO be issued? The answer is found in by-law 25 of the Uniform Building By-Laws, 1986 which states that:

> 25(1) Certificate of fitness for occupation of a building shall be given when -
> (a) the qualified persons during the course of the work have certified in form E as set out in the Second Schedule to these By-Laws that they have supervised the erection of the building, that to the best of their knowledge and belief the building has been constructed in accordance with these By-Laws and any conditions imposed by the local authority and that they accept full responsibility for those portions which they are respectively concerned with and

a the local authority or an officer authorised by it in writing for the purpose has inspected the building.

(b) all essential services, including access roads, landscape, car parks, drains, sanitary, water and electricity installation, fire lifts, fire hydrant and others where required, sewerage and refuse disposal requirements have been provided.

b

(2) Nothing contained in this by-law shall prevent the local authority or any officer authorised by it in writing for the purpose from inspecting any building works at any stage thereof and calling attention to any deviation from the approved plan or non-compliance with any of these By-Laws which he may observe and from giving notice in writing ordering such deviation to be

c rectified.

Mahathir testified that he was and still is with the division in MBJB pertaining to "menguruskan tentang pelan bangunan dan keluarkan sijil kelayakan menduduki (CFO - 'certificate of fitness for occupation') for the last twenty

d years. It can therefore be said that Mahathir is the right witness who should know in what situation a CFO should be issued. When his attention was drawn to the premises in question he said categorically that CFO would not be issued as the reinstatement works were minor. Mahathir clarified the matter further when he said that:

e CFO hanya di keluarkan di atas rumah-rumah yang baru di bina atau renovations yang major seperti menambah bangunan dua tingkat kepada existing premises.

Thus, Mahathir cleared the cloud of uncertainty in that CFO would not be issued in regard to the premises in question. It follows therefore that the

f premises can be occupied and such occupation could have been done way back on 8 February 1991 when Agnes by letter conveyed the news that the reinstatement works had been completed and the keys could be collected from them. Agnes was aware that the reinstatement works were done and completed before the plans were approved by MBJB and she knew that if MBJB imposed

g fines the defendant must shoulder that liability. In fact Agnes unabashedly testified under re-examination that:

To date, my defendant bank is willing to shoulder the fines if ever levied by MBJB. To date, the MBJB has not taken any action against the defendant bank.

h Paragraph 17 of the First Schedule to the Uniform Building By-Laws, 1986 states that:

In all cases where work has been commenced before plans have been approved or a permit obtained a fee equal to ten times that specified in the relevant preceding paragraph may be charged. The payment of this enchance fee will

i not exempt any person from being prosecuted by the local authority should it decide to do so.

The "enchanced fee" must be the fee amounting to RM460 that had been paid and which was adverted to somewhere in this judgment. It was argued by the plaintiffs that RM460 could not be treated as a fee but rather as payment for additional plans in view of the words employed in the plan itself at p. 60 of "IDTD", namely: "Bayaran Pelan RM460 telah di jelaskan." Fortunately, these ambiguities were resolved through Mahathir who emphatically stated that RM460 was in the form of a fine and I see no reason to disagree with him. Mahathir should know the mechanism of his own department. On the question of prosecution, Mahathir put the matter at rest when he said that legal sanctions will not be instituted against the Architect presently or in the near future. But Mahathir issues a warning that legal sanctions will be instituted in the future if the reinstatement works did not comply with the plans that were approved on 30 December 1993. That sums up the magnanimous gesture of MBJB.

It is my judgment, that the plans that were meant to be transmitted to MBJB for approvals were delayed sixteen days (16) by the plaintiffs before the plaintiffs signed those plans. The defendant sent those plans by letter dated 11 February 1991 and only by letter dated 27 February 1991 did those plans returned signed by all the plaintiffs. It was sought to argue that the plaintiffs were abroad and this accounted for the delay in signing those plans. But unfortunately cross-examination on this point was not advanced by the plaintiffs: *Rosita bte Baharom v. Sabedin bin Salleh* [1992] 1 MLJ 379. It is my judgment that when the lease agreement expired on 31 December 1990, the defendant took one month and one week to complete the reinstatement works (calculated from 1 January 1991 to 8 February 1991) and such short period of time must, in the circumstances, be held to be completion within a reasonable time as envisaged in s. 47 of the Contracts Act 1950.

On the question of holding over, all the authorities say that the tenant must hold over wilfully. Thus, in *French And Another v. Elliott* [1960] 1 WLR 40 at p. 51, Paull J remarked that the tenant must wilfully hold over, ie, contumaciously, and not merely by mistake, or under a fair and reasonable claim of title *(Soulsby v. Neving* [1808] 9 East 310, 313; *Poole v. Warren* [1838] 8 A. & E. 582; *Swinfen v. Bacon* [1861] 6 H. & N. 184, 186) or where title to remain in possession was vested by the Rent Acts (*Crook v. Whitbread* [1919] 88 LJKB 959). It was held in the case of *French And Another v. Elliott (supra)* that a tenant who holds over after the expiration of a notice to quit in the mistaken but honest belief that the notice is bad does not hold over wilfully. Paull J in simple terms in the case of *French And Another v. Elliott (supra)* said this:

> At that moment of time a tenant may say: 'I shall stay on.' 'I think I have a right to do so.' His staying on is not wilful. On the other hand, a tenant may say: 'I will stay on, although I know I have no right to do so.' That is wilful, and well illustrates the now sometimes forgotten distinction between 'I shall' and the insistent 'I will'. In this case there was, in my judgment, a sufficient muddle on both sides to prevent the wilfulness arising. since the defendant may not unreasonably have thought that he could not be disturbed until the arbitration had taken place.

Although Paull J, made those observations in regard to the meaning of the word "wilfully" in the context of the Landlord and Tenant Act, 1730, yet those observations are germane and should be adopted in construing whether the defendant here was wilfully holding over the premises after 31 December 1990.

Across the causeway in the Singapore Court of Appeal case of *Lee Wah Bank Ltd v. Afro-Asia Shipping Co (Pte) Ltd* [1992] 2 SLR 93, the Court there had to construe the expression "holding over" in s. 19 (4) of the Civil Law Act (Cap 43, 1988 Ed). In that case the appellants were the tenants of the ground floor and first floor office units in Afro-Asia Building, leased to them by the respondents. The original tenancy was extended to 30 November 1983 at the appellant's request. Clause 2 (19) of the tenancy agreement stated that at the expiration or sooner determination of the tenancy, the appellants were to yield the demised premises to the respondents; further, that the appellants were to reinstate the demised premises to their original state and condition at their own expense before the tenancy expired. By 21 November 1983 the appellants had physically vacated the demised premises. On 1 December 1983 they tendered the keys to the premises but the respondents accepted only the keys to the first floor premises. They rejected the keys to the ground floor premises on the basis that the reinstatement works there were uncompleted. On 5 December 1983 the respondents accepted the keys to the ground floor premises, but claimed that they did so 'under protest', as there allegedly remained uncompleted restoration works. All such works were finally completed on 19 December 1983, whereupon the respondents sued for double rent pursuant to s. 19 (4) of the Civil Law Act (Cap 43, 1988 Ed). The trial Judge allowed the claim. The appellants appealed and the Court of Appeal allowed the appeal. Yong Pung How CJ, delivered the judgment of the Court of Appeal and this was what he said:

> To establish that there was a holding-over of the demised premises, the respondents must show that even after the expiration of their tenancy, the appellants continued to exercise a degree of possession and control over the demised premises which precluded the respondents from excluding them from the demised premises at their (the respondents) will.

The Court of Appeal in *Lee Wah Bank Ltd (supra)* was of the view that there was no holding over of the demised premises because the covenant was to yield the demised premises and to reinstate the same to their original state and condition; it was not a condition precedent that the appellants were not entitled to yield the demised premises unless they had reinstated the same to their original state and condition. The Court of Appeal also held that the expression "holding over" in s. 19 (4) of the Civil Law Act (Cap 43, 1988 Ed) requires an intention on the part of the tenant to refuse to deliver up the premises with knowledge that he has no right to remain in possession. The respondents could not prevent the appellants from yielding the demised premises by vacating them and delivering the keys to them. The respondents had no right to refuse to accept the keys and their refusal to do so could not have resulted in the appellants holding over after the determination of the tenancy.

By way of contrast, in *Lee Wah Bank Ltd (supra)* the relevant clause required the appellants there to reinstate the premises to their original state and condition before the expiration of the tenancy and as a result it was held that there was no holding over for the duration of the reinstatement period. Whereas in the present case before me the defendant was under no obligation to reinstate unless required to do so by the plaintiffs on the expiry of the lease agreement and, consequently, I so hold and it is my judgment that the acts of reinstatement done at the insistence of the plaintiffs will not in law amount to holding over of the premises. Agnes testified, as I said earlier, that the premises was physically vacated on 17 December 1990 and that the defendant had no intention to stay on the premises. But since the plaintiffs requested that reinstatement works be carried out the defendant retained the keys for that purpose and nothing else. Once the reinstatement works were completed on 8 February 1991, the defendant was ever willing to return the keys to the premises to the plaintiffs. On these facts, the defendant cannot be said to hold over the premises.

It is interesting to note that *Black's Law Dictionary* by Henry Campbell Black; M.A., sixth edn. at p. 731 defines the expression "hold over" to mean "to retain possession as a tenant of property leased, after the end of the term. To continue in possession of an office and continue to exercise its functions, after the end of the officer's lawful term." The same dictionary at p. 1163 defines the word "possession" as "having control over a thing with the intent to have and to exercise such control." The same dictionary also defines the expression "vacant possession" as "an estate which has been abandoned, vacated, or forsaken by the tenant. The abandonment must be complete in order to make the possession vacant, and, therefore, if the tenant have goods on the premises it will not be so considered."

Thus, it can be argued that where premises vacated by the tenant with no intention "to have and exercise such control" as a tenant, then it cannot be said that the tenant was "holding over" the premises. It is my judgment that on both facts and the law, there was no holding over of the premises by the defendant.

Next, it was argued that the failure of the defendant to call the Architect by the name of Zainal Abidin Sarajudin was fatal as the Architect's evidence which could be and was not produced would if produced be unfavourable to the defendant under s. 114(g) of the Evidence Act 1950. In *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp. Bhd* [1991] 1 MLJ 33 the then Supreme Court had occasion to briefly refer to s. 114(g) of the Evidence Act 1950. In that case Hashim Yeop A. Sani CJ (Malaya) (as he then was) speaking for the then Supreme Court referred to the evidence and said:

> It must be appreciated in this case that the learned trial judge had only the evidence adduced on behalf of the respondents and documents which speak for themselves. DW1 had no personal knowledge of what went on in respect of the transaction involving the two machines. It was not disputed that an important official of the appellants involved in the transactions was in fact one Bart Chew who signed the documents P1E and P2E. DW1 also stated that Mr. Mah Kim, the financial controller of the appellant company, must also sign the certificate but Mr. Mah Kim was not called to give evidence. Another person who should also have first hand knowledge of the transaction was one Mr. Lazar Fredericks who was the credit controller of the appellant company at the material time. Mr. Lazar Fredericks' duty was to monitor the payments and to chase customers for money in respect of equipment sold by the appellants. He was also not called to give evidence. No reasons were given why all these persons were not called to give evidence. The learned trial judge invoked s. 114(g) of the Evidence Act 1950 against the appellants and we think he was quite correct under the circumstances to do so.

In *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 SC, it was argued that the non-calling of (a) the unknown informer and (b) the typist together with (c) the absence of the accuracy certificate in respect of the weighing machine used by the Government chemist breached the adverse inference rule under s. 114(g) of the Evidence Act 1950. His Lordship Mohamed Azmi SCJ (now FCJ) in a careful and painstaking judgment said:

> It is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

His Lordship held that in regard to the non-calling of the informer, the protection of s. 40(1) of the Dangerous Drugs Act 1952 clearly applies since the evidence showed that all the informer did was to accompany the police officer and introduce him to the appellant. In regard to the non-calling of the typist his Lordship held that there was overwhelming evidence that the cannabis produced in court was indeed the one recovered by the police from the appellant and the evidence was sufficient to rebut any adverse inference under s. 114(g) of the Evidence Act 1950 so as to render the calling of the typist as a prosecution witness, to show the clerical mistake in addressing the exhibits, wholly unnecessary. In regard to the accuracy certificate of the weighing machine his Lordship was of the view that since the amount of cannabis was shown to be more than 600 grammes of the drug, although only 200 grammes are sufficient to attract the presumption of trafficking under s. 37(da), (vi) of the Dangerous Drug Act 1952 and therefore whatever inaccuracy there might in the weighing machine (for which there is no evidence) is covered by the legal maxim *"de minimis non curat lex"* (the Court does not deal in trivialities).

The question to ask is this. Is the Architect an important and material witness to the present case? Unlike the three personalities in *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp. Bhd (supra)* who were certainly important and material witnesses to the unfolding of the facts, the same cannot be said of the Architect in the present case. The Architect merely prepared the relevant plans which were approved after the reinstatement works had been done. That was the only role played by the Architect and it can be said to be minimal, unimportant and immaterial. If the defendant had failed to call Mahathir, an important and material witness, then the adverse inference under s. 114(g) of the Evidence Act 1950 could rightly be invoked. Mahathir had said that the Architect would not be charged and no one for that matter would be charged. The Architect would not be in a position to explain about the issuance of the CFO as it comes under the portfolio of Mahathir and not that of the Architect. For these reasons, I ruled that the adverse inference rule cannot be invoked in the present case.

Initially, under examination-in-chief Lai Heng testified that he had no-personal knowledge that the party walls had been reinstated as he did not visit the premises but later he relented, again under examination-in-chief, that the defendant had restored the premises to its original state and condition. It is a sad observation to make that though Lai Heng knew that shophouses numbers 68 and 72 have been occupied and its occupation would bear testimony that the party walls had been reinstated, yet he remained steadfast to his belief that the plaintiffs should not re-enter the premises until the CFO has been issued. With the evidence of Mahathir, Lai Heng will have to wait till doomsday for the issuance of the CFO by MBJB.

Lai Heng seems to rely on his experience as a developer to say that the rental market value for the Jalan Wong Ah Fook area would be RM15,000 per month and he says this when he gave evidence on 14 September 1995. But what would be the market rental values of the premises between 1 January 1991 to 13 September 1995 or for that matter between 1 January 1991 to 8 February 1991 (the crucial one month one week before the keys to the premises were ready for collection after the re-instatement works had been done)? No answers were forthcoming. Is Lai Heng an expert to assess the market value of the premises? This must surely be the pivotal question and it is for this court to decide whether a person is or is not an expert. For the court to come to that finding of fact, facts by way of evidence on oath must be adduced that the person, whom the plaintiffs want the court to rely on as an expert, has the necessary:

(1) Academic qualifications,

(2) Training, and

(3) Court and work experiences, particularly whether his evidence has been accepted by the Courts.

Without such evidence on record this Court do not have a basis to come to such a finding of fact (*Wong Chop Saow v. Public Prosecutor* [1965] 1 MLJ 247; *Public Prosecutor v. Muhamed bin Sulaiman* [1982] 2 MLJ 320 FC). I hold and it is my judgment that Lai Heng is not an expert witness and his evidence in regard to the market rental of the premises is highly suspect and must be relegated into oblivion.

Be that as it may, the issue of double rent as envisaged under s. 28(4)(a) of the Civil Law Act 1956 and as submitted by the plaintiffs can only arise if there was holding over. Since I have ruled that there was no holding over in the present case, the issue of double rent must necessarily fail.

I must put on record that trivial issues that were raised were not discussed as they do not affect the other principle issues which were amply set out in this judgment. It is unfortunate that the plaintiffs failed in their claim but that is the natural outcome of an adversarial system like ours. For the reasons adumbrated above, I dismissed the plaintiffs' claim with costs.

There were two counterclaims by the defendant. The first counterclaim was in regard to the sum of RM6,000 which the defendant paid to the second plaintiff, namely, Lai Heng in 1979. There was evidence emanating from Lai Heng that it was he who insisted that the defendant pay RM6,000 to him before the defendant was allowed to break the party walls of shophouses

numbers 68 and 72 that directly affected the premises. Lai Heng agreed that once the party walls had been reinstated he had no choice but to refund RM6,000 back to the defendant and he agreed that he has yet to refund the said sum to the defendant.

The second counterclaim was in the form of deposit amounting to RM24,000 which the defendant paid to the plaintiffs as deposit under the lease agreement. Agnes testified to this. She said that this amount was still due and payable to the defendant by the plaintiffs.

These two counterclaims sprang up from the lease agreement and it can therefore be said to be sufficiently connected with or allied to the subject matter of the principle claim so as to make it necessary in the interests of justice that it should be dealt with along with the principal sum: *Esso Standard Malaya Bhd v. Southern Cross Airways* [1972] 1 MLJ 168; *Padwick v. Scott* 2 Ch. D. 736.

As there were ample evidences in regard to the two counterclaims, the following orders were made.

(1) The defendant's counterclaim against the second plaintiff was allowed with costs. This meant that the second plaintiff was ordered to repay the defendant the sum of RM6,000 together with interest at the rate of 8% per annum from 1 January 1991 to date of payment or realisation.

(2) The defendant's counterclaim against all the plaintiffs was allowed with costs.

By this order, all the plaintiffs were ordered to repay the defendant the sum of RM24,000 together with interest thereon at the rate of 8% per annum from 1 January 1991 to date of payment or realisation.